

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



**ORIGINAL**

**75-7244**

To be argued by  
MORRIS WEISSBERG

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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C.D.R. ENTERPRISES LTD., :

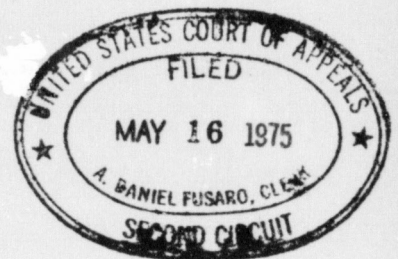
Plaintiff-Appellant, :

-against- :

HARRISON J. GOLDIN, individually, and :  
as Comptroller of the City of New York, :

Defendant-Appellee. :

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APPELLANT'S BRIEF  
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STATUTES CITED

New York Labor Law, section 220-b(2)	7;8; 9;21
New York Lien Law, section 21	8; 21

To be argued by  
MORRIS WEISSBERG

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

----- X

C.D.R. ENTERPRISES LTD., :

Plaintiff-Appellant, :

-against- :DOCKET # 75-7244

HARRISON J. GOLDIN, individually, and :  
as Comptroller of the City of New York, :

Defendant-Appellee. :

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APPELLANT'S BRIEF

Statement of Issues

1. Did the plaintiff have a constitutional right to give a bond to release money due to it as progress payments on work it completed on public contracts, payment whereof defendant ordered withheld pending his administrative determination of allegations that plaintiff did not pay the prevailing rate of wages to workers whom it employed upon such public contracts?

2. Did the plaintiff have a constitutional right to a preliminary evidentiary hearing and determination of the amount of money which shall be withheld pending the administrative hearing and determination of the said allegations?

3. Did section 220-b(2) of the New York Labor Law unconstitutionally deny to plaintiff the equal protection of the laws by making no provision for filing a bond to release money due to a contractor for completed work on public contracts, where a public official orders such money to be

withheld pending his administrative determination of allegations of non payment of prevailing wages, whereas section 21 of the New York Lien Law provides that a worker may file a lien for unpaid wages against public money due to a contractor, and that such contractor may release such lien by filing a bond to secure payment of any wages adjudged to be due to such worker?

The Court below (Mac Mahon, J.) decided the above questions in the negative.

#### Statement of the Case

On October 11, 1974, the defendant caused to be served upon the plaintiff a notice of a hearing under section 220 of the New York Labor Law upon allegations that the plaintiff did not pay to four named persons prevailing rates of wages of \$2,188.54 (14).

On November 4, 1974, the defendant caused to be served upon the plaintiff a different notice of a hearing under section 220 of the New York Labor Law upon allegations that the plaintiff did not pay to three named persons prevailing rates of wages of \$26,510.50 (14).

Plaintiff denied such allegations (14).

On November 7, 1974, defendant caused to be issued a "Stop Payment Order", whereby he directed that pending the administrative hearing and determination of the aforesaid allegations, the sum of \$10,207.39 shall be withheld from the money due to the plaintiff for work it completed upon public work

contracts (14).

Defendant caused hearings upon the said allegations to be held on November 13, 1974, and on December 3 and 6, 1974, before a hearing officer whom defendant designated (15).

On December 3, 1974, plaintiff asked the defendant to accept a surety company bond in place of the \$10,207.39 which defendant's hearing officer previously ordered to be withheld, but the defendant declined to do so (15).

Section 21 of the New York Lien Law provides that a laborer employed upon a public work contract may file a lien for his unpaid wages against the public money due to the contractor who employed him; and that such contractor may release such lien by filing a surety company bond to secure payment of any wages which may be adjudged to be due to such worker (15). In this case, no worker in plaintiff's employ filed any such lien (16).

At the end of a hearing session on December 6, 1974, the hearing officer canceled a hearing session which he previously scheduled for December 13, 1974, and he adjourned the hearings without date (16). He did not resume the hearings by April 14, 1975, when the Court below dismissed the complaint herein.

Defendant's pre-judgment seizure of plaintiff's money has continued in effect to date.

Plaintiff claims that the absence of a provision in section 220-b(2) of the New York Labor Law that a contractor may file a bond and thereby release the money which that statute

authorized to be withheld to pay wages which may be determined to be owed to laborers for their work upon a public contract, unconstitutionally deprived the plaintiff of its property without due process of law, and of the equal protection of the laws, and made that statute unconstitutional and void (16-17; 26-27).

A second claim for relief alleged that defendant's aforesaid unconstitutional actions gave the plaintiff a cause of action under the Civil Rights Act, 42 U.S.C. section 1983, for redress, and for damages (18).

#### Prior Administrative and Judicial Proceedings

On October 11, 1974, the defendant commenced an administrative proceeding under section 220-b(2) of the New York Labor Law by serving upon the plaintiff and upon two other firms a notice of administrative hearing and a statement that Ianelli Construction Company, C.D.R. Enterprises, and KMA Construction Corp., failed to pay to four named persons whom they allegedly employed between March 2, 1974 and April 3, 1974, prevailing rate of wages of \$2,188.54. (20-21).

On November 4, 1974, the defendant served upon the plaintiff and upon the aforesaid firms another notice of hearing with a statement that Ianelli Construction Company, K.M.A. Construction Corp., C.D.R. Enterprises and John Durandes failed to pay to three named persons whom they allegedly employed between May 5, 1973 and July 26, 1974, prevailing rate of wages of \$26,510.50 (22-23).

On November 7, 1974, before the hearings commenced, the defendant's hearing officer, ex parte issued a "Stop Payment Order" whereby he directed that pending his administrative hearing and determination of the aforesaid allegations, the sum of \$10,207.39 shall be withheld from the money due to the plaintiff for completed work upon public contracts (24).

Thereafter, hearing sessions were held on November 13, 1974, and on December 3 and 6, 1974 (15).

On December 3, 1974, plaintiff made a written request that defendant shall accept a surety company bond in place of \$10,207.39 withheld pursuant to the aforesaid "Stop Payment Order", but the defendant refused such request (15; 25).

At the end of a hearing session on December 6, 1974, the hearing officer whom defendant designated canceled a hearing session which he previously scheduled for December 13, 1974, and he has not resumed such hearing to date of dismissal of the complaint on April 14, 1975 (33; 40; 45-47; 53-61).

On January 3, 1975, the defendant's hearing officer issued an ex parte revised "Stop Payment Order", whereby he increased from \$10,207.39 to \$14,809.09 the amount of money which he directed to be withheld from the money due to plaintiff for work it completed upon public contracts (48-50).

To date, the administrative hearings have not been completed; no administrative determination has been made; and the sum of \$14,809.09 of money due to plaintiff for work upon public contracts continues to be withheld pursuant to

defendant's aforesaid "Stop Payment Orders" (63-65).

On December 10, 1974, plaintiff commenced this action, and made a motion for a preliminary injunction restraining the defendant from withholding money due to plaintiff for work upon public contracts providing plaintiff files a bond to secure payment of wages determined to be due; and to convene a 3-judge court to determine whether section 220-b(2) of the New York Labor Law violates section 1 of the Fourteenth Amendment to the Constitution of the United States by authorizing the withholding of money from a public work contractor without providing for filing a bond to replace and to release the money so withheld. No temporary restraining order was requested (28-29).

Defendant did not serve an answer to the complaint. Instead, on January 2, 1975, defendant served a notice of motion pursuant to Rule 12(b)(1) & (6), F.R.C.P., to dismiss the complaint, on the ground that the Court lacks jurisdiction over the subject matter of the action, and that the complaint does not state a claim upon which relief can be granted (11).

By a memorandum decision and order, dated April 14, 1975, the Court (Mac Mahon, J.) granted defendant's cross-motion and dismissed the complaint for lack of jurisdiction of the subject matter; and the Court denied plaintiff's motion for a preliminary injunction, and to convene a three-judge court (12-19).

POINT I

PLAINTIFF HAD A CONSTITUTIONAL RIGHT TO GIVE A BOND TO RELEASE MONEY WHICH DEFENDANT ORDERED WITHHELD FROM PAYMENT FOR PUBLIC CONTRACT WORK PENDING ADMINISTRATIVE DETERMINATION WHETHER PLAINTIFF PAID THE PREVAILING RATE OF WAGES TO WORKERS IT EMPLOYED UPON SUCH WORK.

I.

In Mitchell v. W.T. Grant Co., 416 U.S. 600, 607 (1973), the Court said that Louisiana statutory provisions for ex parte pre-judgment seizure of property require "constitutional accommodation" between conflicting interests of the person in possession of property and the person claiming that some act or default of the possessor of the property gave the claimant a right immediately to repossess such property.

Factors in such constitutional accommodation discussed in the Mitchell case included statutory provisions that:

"The debtor, with or without moving to dissolve the sequestration, may also regain possession by filing his own bond to protect the creditor against interim damage to him should he ultimately win his case and have judgment against the debtor for the unpaid balance of the purchase price which was the object of the suit and of the sequestration."

In this case, unlike the Mitchell case, section 220-b(2) of the New York Labor Law authorizes withholding of money due to a contractor for public contract work, in advance of an evidentiary administrative hearing and determination whether the contractor paid the prevailing rate of wages to his workers, and without a provision authorizing such contractor to make a motion in court to vacate such withholding of his money, and without a provision that such contractor may file a bond, and thereby obtain payment to him of the money so withheld.

The object of the provision in section 220-b(2) of the New York Labor Law authorizing the withholding of money due to a contractor for public contract work, is to provide a fund from which to pay any wages which may be found to be due to workers employed upon such public contract work.

That object would be accomplished just as fully and effectively by a bond given to secure payment of any wages determined to be due upon evidence at an administrative hearing.

In a New York statute which is in pari materia with section 220-b(2) of the New York Labor Law - namely, section 21 of the New York Lien Law - provision is made that a contractor may file a bond to release public money due him for his public contract work, against which a lien for unpaid wages was filed by a worker whom he employed upon such public contract work.

Thus, section 21 of the New York Lien Law expresses the judgment of the New York Legislature that a bond would provide adequate security for payment of wages to workers on public work contracts,

There is no valid reason why a contractor should be allowed to give a bond to secure payment of wages for public contract work, when one of his workers files a lien for his wages under section 21 of the New York Lien Law, but not when a public official orders the withholding of payment to a contractor for his public contract work, under section 220-b(2) of the New York Labor Law.

The record shows that no workers employed by plaintiff

filed a lien for unpaid wages (16). Yet, the plaintiff is in a worse position than he would have been if his workers had filed such liens, because then the plaintiff could have exercised a statutory right to file a bond to secure payment of the wages claimed and thereby release such liens, but it is not allowed to file such a bond with regard to the money which the defendant ordered to be withheld under section 220-b(2) of the Labor Law.

## II.

In his briefs below, the defendant did not argue that a bond would not provide adequate security for payment of wages determined to be due to workers employed on public contract work.

Instead, the defendant argued that withholding money due to a public work contractor is "less cumbersome" than filing a bond to secure payment of wages which may be determined to be due, because "payment to the workers can be made immediately upon the determination that they have been wrongfully underpaid."

But section 220-b(2) of the New York Labor Law provides that money withheld from a contractor shall not be paid to his workers until after a "final determination" has been made after judicial review of an administrative determination that the contractor underpaid wages to his employees.

Defendant also argued below that filing a bond to secure payment of money withheld from a public work contractor "would burden the City with having to enforce the bond".

We submit that a bond to pay wages which are determined to

be due is the same as the payment bond which the City itself requires contractors to give when it awards them public work contracts. In requiring such payment bonds the City shows no undue concern that it may need to enforce such bonds by suing thereon.

Moreover, a possible need to sue upon a payment bond is only a remote possibility, which may reasonably be imposed on the City to provide a "constitutional accommodation" of the conflicting interests of the parties which is needed to sustain such a pre-judgment seizure of a public work contractor's money.

In a variety of circumstances, statutes provide for release of property from pre-judgment seizure by filing a bond to secure payment of any money which may be adjudged to be due.

Provision for such bonds is made in the Renegotiation Act which authorizes the Renegotiation Board to make an ex parte administrative determination that a contractor made excess profits on a contract with the Federal government; and it provides that such administrative determination may be enforced by seizing property of the contractor or by withholding money due such contractor from the government, but that such contractor may file a bond to secure payment of any excess profits which may be adjudged to exist at a de novo hearing in the Court of Claims. See: Renegotiation Board v. Bannerkraft Co., 415 U.S. 1 (1973); Lichter v. United States, 334 U.S. 742 (1948).

Provision is also made by statute for filing a bond to release property seized by tax collectors under the tax laws.

See: Phillips v. Commissioner, 283 U.S. 589 (1930).

Replevin and attachment statutes usually provide that persons whose property was taken from them by replevin or attachment may recover possession thereof by filing a bond for the equivalent value of such property plus court costs. See: Fuentes v. Shevin, 407 U.S. 67 (1972).

In Sandness' Sons, Inc., v. United States, 462 F. 2d 1388, 1391 (Court of Claims, 1972), and in United States v. Rutkin Precision Mfg. Corp., 376 F. Supp. 392 (D. Connecticut, 1974), it was held that where a contractor did not have the financial ability to post a bond to stay collection of excess profits in an amount administratively determined by the Renegotiation Board, the Court would not aid the government to collect such excess profits in advance of a de novo hearing and determination by the Court of Claims. In the Sandness' case, the Court said:

"Defendant wishes to default the plaintiff and thereby deny it any due process hearing on the merits. This it cannot do. Its motives in alternatively asking a judgment in aid of execution of the Board's order can only be surmised. It certainly seems possible that such a judgment might be used to destroy the capacity of an indigent corporation to litigate further. This, in our opinion, would be an unconstitutional result, and the statute must be construed to avoid bringing it about."

### III.

Defendant also argued below that plaintiff's public work contracts were subject to provisions in section 220-b(2) of the New York Labor Law which authorized withholding of payment for contract work pending administrative determination whether prevailing wages were paid.

But in contracting subject to such statutory provisions, the plaintiff did not expressly or impliedly waive its right to challenge the constitutionality of the statute in this action on the ground that it unconstitutionally deprives plaintiff of property without due process of law and denies to it the equal protection of the laws by making no provision for filing a bond to secure payment of wages which may be determined to be due, and thereby release money payment whereof was withheld.

A similar argument was rejected in Fuentes v. Shevin, supra, 407 U.S. 67, 94, 96 (1972) where the Court said:

"Finally, we must consider the contention that the appellants who signed conditional sales contracts thereby waived their basic procedural due process rights. \*\*\*

\*\*\* the purported waiver provisions here are no more than a statement of the seller's right to repossession upon occurrence of certain events. \*\*\* the language of the purported waiver provisions did not waive the appellants' constitutional right to a preseizure hearing of some kind."

Defendant also argued below that his withholding of payment in advance of an administrative hearing and determination did not deprive plaintiff of any property or contract right, because defendant had a right to hold an administrative hearing and make an administrative determination of allegations of non payment of prevailing wages before it released payment to plaintiff for its public contract work.

This argument, too, was rejected in Fuentes v. Shevin, supra, 407 U.S. 67, 87 (1972), where the court said:

"If it were shown at a hearing that the appellants had defaulted on their contractual obligations, it might well be that the sellers of the goods would be entitled to repossession. But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses, that is immaterial

here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. \*\*\* It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods."

#### IV.

The decision below cited and quoted from Bourjois, Inc., v. Chapman, 301 U.S. 183, 189, 190 (1937), that no hearing was required in that case before making an administrative determination denying an application for registration of cosmetics; and that due process was provided by a statutory provision for judicial review of such administrative determination.

We submit that the Bourjois case is not applicable to this case because it did not consider or decide whether pending a determination of the right to possession of money or property there is a constitutional right to give a bond to obtain possession of money payment whereof was withheld in advance of a hearing and determination of a right to possession thereof - which is the question in this case.

The opinion in the Bourjois case said that it did not involve the constitutionality of a pre-judgment seizure of property. The Court said:

" \*\*\* if there is a wrongful seizure, it will be of goods belonging to others. For, as the bill and findings reveal, no goods of the plaintiff will ever be liable to seizure, since the plaintiff will have none in Maine."

V.

The decision below stated (7):

" \*\*\* the hearings concerning whether plaintiff paid the prevailing rate of wages have not been completed due to plaintiff's refusal to supply the hearing officer with records of its wage payments. Once plaintiff supplies those records the Comptroller will be able to render his decision."

We submit that because time is consumed in a post-seizure administrative hearing and determination of conflicting claims to seized property, and in judicial review of such administrative determination, that the plaintiff has a constitutional right to file a bond to secure payment of any wages which may be adjudged to be due, and thereby release money payment whereof was withheld.

In the Mitchell case, supra, the Court emphasized statutory provisions for reducing delay in determining at a post-seizure hearing conflicting claims to seized property. The Court said (416 U.S. at 610):

"Finally, the debtor may immediately have a full hearing on the matter of possession following the execution of the writ, thus cutting to a bare minimum the time of creditor- or court-supervised possession."

In this case, it was the defendant, and not the plaintiff, who wrongfully delayed the administrative hearing for five months, by his actions at a hearing session on December 6, 1974, when he canceled a hearing session which he previously scheduled for December 13, 1974, adjourned the hearing without fixing a date for the next hearing, and he has not resumed the hearing up to and beyond April 14, 1975, when the judgment below dismissed the complaint.<sup>1</sup>

1. Defendant resumed the hearing on April 30, 1975, and he has scheduled hearing sessions for May 16 and 28, 1975.

The minutes show that at a hearing session on December 6, 1974, the defendant's hearing officer directed the plaintiff to give the defendant possession of plaintiff's records, or photocopies thereof, pursuant to defendant's subpoena of such records (53-61); and that at an abortive hearing session on March 4, 1975, the hearing officer did not proceed with the hearing because the plaintiff did not give him an inspection of its records (63-65).

Defendant's subpoena did not require the plaintiff to give the defendant possession of its records, or photocopies thereof, or an inspection thereof. Instead, that subpoena only required the plaintiff:

" \*\*\* that you bring with you and produce at the time and place aforesaid any and all books, records, and documents \*\*\* ."

Plaintiff complied with that subpoena by bringing its records to the hearing and offering to have them entered into evidence, and that plaintiff's Secretary shall testify about his knowledge of entries therein (53-61).

The proceeding in which such subpoena was issued was an administrative proceeding . The provisions of New York Civil Practice Rule 3120 about discovery of documents apply only to judicial proceedings in a court, and not to administrative proceedings.

In Matter of Corporation Counsel v. Smith, 1 N Y 2d 813, 153 N.Y.S. 2d 72, the Corporation Counsel applied for an open commission to take the testimony of a non resident for use in an administrative proceeding for discipline of a civil service employee in which an evidentiary hearing was prescribed by

statute. The New York Court of Appeals denied the application for a commission to take testimony, on the ground that no statute authorized discovery of evidence in an administrative proceeding, as distinguished from an action in a court of law. The Court said:

"Order reversed and motion denied upon the ground that there is no statutory authority for the order appealed from."

In Matter of Saratoga Harness Racing Assn. v. Monaghan, 9 Misc. 2d 868, 872, 169 N.Y.S.2d 520, 524, the Court said:

"A subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence."

In Franklin v. Judson, 96 App. Div. 607, 88 N.Y.S. 904, the Court said that a subpoena duces tecum:

" \*\*\* gives no right whatever to an inspection of the books by \*\*\* counsel".

In Matter of Amalgamated Union v. Levine, 31 Misc. 2d 416, 219 N.Y.S.2d 851, 853, the Court said:

" \*\*\* it has long been the law that property produced pursuant to subpoena duces tecum may not be retained by the person or body before whom produced, except by order of the court, whether the matter be criminal (citations) or civil (citations)."

The Federal rule also gives no right to inspect or to copy documents produced in an administrative proceeding pursuant to subpoena duces tecum.

In Buscher v. United Shoe Machinery Corp. 23 F.R.D. 183, 185 (S.D.N.Y. 1958), the Court said:

"Because a document has been produced at a deposition, whether under subpoena or otherwise, does not give the opposing party the right to inspect and copy it."

POINT II

PLAINTIFF HAD A CONSTITUTIONAL RIGHT TO A PRELIMINARY EVIDENTIARY HEARING AND DETERMINATION OF THE AMOUNT OF MONEY TO BE WITHHELD FROM PAYMENTS TO PLAINTIFF FOR ITS PUBLIC CONTRACT WORK, PENDING A POST-SEIZURE ADMINISTRATIVE HEARING AND DETERMINATION OF ALLEGATIONS THAT PLAINTIFF DID NOT PAY PREVAILING WAGES TO ITS WORKERS.

Before November 7, 1974, when defendant issued his first "Stop Payment Order", whereby he directed withholding payment of \$10,207.39 to plaintiff for its public contract work, the plaintiff had a constitutional right to an evidentiary hearing and determination of the amount of money which shall be so withheld from payments due it for its public contract work.

In Bell v. Burson, 402 U.S. 535, 540 (1970), the Court said:

"Since the only purpose of the provisions before us is to obtain security from which to pay any judgments against the licensee resulting from the accident, we hold that procedural due process will be satisfied by an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee."

(emphasis supplied)

In this case, section 220-b(2) of the New York Labor Law does not require a hearing to determine the amount of money which shall be withheld from payments due for public contract work; and no such hearing was held in this case.

In Wright v. Malloy, 373 F. Supp. 1011, 1023 (D.C. Vt. 1974), a three-judge Court held that a statute which failed to require a hearing as to the amount of security to be given by the operator of a vehicle which was involved in an accident, unconstitutionally deprived such vehicle operator of procedural due process of law. The Court said:

"Although, as discussed above, the statute withstands plaintiffs' constitutional challenges on all other grounds, we nevertheless find that it impermissibly violates procedural due process in failing to provide a hearing as to the amount of security required to be posted by the operator involved."

Similarly, in Lee v. Thornton, 370 F. Supp. 312, 320 (D.C. Vt. 1973), a three-judge Court said:

"The special emphasis that we place on the phrase "in the amounts claimed" stems from our reading Bell to require a hearing both to determine the probability of a judgment's being had and that the amount of the bond, if required at all, be reasonable relative to whatever judgment might finally become due."

The record shows no factual basis for defendant's initial fixation of \$10,207.39 as the amount which he directed to be withheld by his first "Stop Payment Order", dated November 7, 1974 (24); nor for his subsequent increase of such withholding to \$14,809.09, by his revised "Stop Payment Order", dated January 3, 1975 (48-50).

Defendant submitted an affidavit by Benedict Santeramo, an employee in his office, who said that based on plaintiff's payroll book and on examination of entries in school custodians' log books of who and when persons performed work at the schools, there was prepared a notice of hearing and a statement dated October 11, 1974 that plaintiff underpaid wages of \$2,188.54 to its workers (38).

However, Mr. Santeramo also said that such first notice was "replaced" by another notice, dated November 4, 1974, which alleged that plaintiff underpaid wages of \$26,510.50 to its workers (38).

Mr. Santeramo did not explain how these sums were determined, nor why two different amounts were determined to be underpayments of wages, after examination of plaintiff's payroll book and school custodians' log books.

Therefore, defendant's pre-judgment withholding of \$14,809.09 of money due to plaintiff for its public contract work should be annulled because the defendant made such withholdings of money without first holding an evidentiary hearing and making a determination of the probability of a judgment that plaintiff underpaid wages to its employees, and the reasonable amount, if any, that should be withheld to provide a fund from which to pay any such judgment.

## POINT III

SECTION 220-b(2) OF THE NEW YORK LABOR LAW UNCONSTITUTIONALLY DENIED TO PLAINTIFF THE EQUAL PROTECTION OF THE LAWS BY MAKING NO PROVISION FOR FILING A BOND TO RELEASE MONEY DUE TO A CONTRACTOR FOR PUBLIC CONTRACT WORK, WHERE A PUBLIC OFFICIAL ORDERS SUCH MONEY WITHHELD PENDING ADMINISTRATIVE DETERMINATION WHETHER PREVAILING WAGES WERE PAID, WHEREAS SECTION 21 OF THE NEW YORK LIEN LAW PROVIDES THAT A CONTRACTOR MAY GIVE A BOND TO DISCHARGE A LIEN FOR UNPAID WAGES FILED BY A WORKER AGAINST MONEY PAYABLE FOR PUBLIC CONTRACT WORK.

The decision below cited F. S. Royster Guano Co., v. Virginia, 253 U.S. 412 (1920) to support the following statement in the decision (7-8):

"Plaintiff has utterly failed to show that §220-b(2) grants something to other employers engaged in public contracts that it denies to plaintiff. In addition, construing plaintiff's claim to mean that the withholding procedure of §220-b(2) denies the class of employers engaged in public contracts equal protection, vis-a-vis employers not engaged in such contracts, we conclude that this classification is reasonable as it helps effectuate the public policy of New York that employees engaged in public projects be paid the prevailing rate of wages."

The above-quoted statement did not consider or decide plaintiff's contention that it was denied equal protection of the laws.

Plaintiff contends that where a worker employed on a public work contract files a lien against the public money payable for his public contract work, section 21 of the New York Lien Law gives to the contractor a statutory right to discharge such lien by filing a bond to secure payment of any wages which may be adjudged to be due; and that the absence of a similar bond provision in section 220-b(2) of the New York Labor Law, which also involves claims of non payment of wages to workers employed on public work contracts, unconstitutionally

denies the equal protection of the laws to public work contractors, such as the plaintiff.

The Royster case did not consider or decide whether there is a constitutional right to give a bond to regain possession of property taken by a pre-judgment seizure thereof.

However the Royster case held unconstitutional a Virginia statute which imposed a Virginia income tax on income earned by a Virginia corporation outside of Virginia, as well as on income it earned inside Virginia, whereas it imposed no income tax on Virginia corporations which earned all their income outside of Virginia. In holding such statute unconstitutional, the Court said that a statute denies equal protection of the laws where it makes different provision from another statute with respect to the same subject matter, and there is no substantial reason for such different treatment.

The principle which the Court applied in holding unconstitutional a Virginia tax statute in the Royster case, clearly applies to this case.

There is no substantial reason why section 21 of the New York Lien Law provides that a lien for unpaid wages filed by a person employed on a public work contract may be discharged by filing a bond to pay any wages adjudged to be due, and section 220-b(2) of the New York Labor Law does not provide for filing a bond to release money withheld pending administrative determination whether prevailing wages were paid to workers employed on public work contracts.

Section 21 of the New York Lien Law, and section 220-b(2)

of the New York Labor Law are statutes in pari materia which deal with the same subject and have the same purpose - namely, providing security for payment of wages to workers employed on public work contracts.

We submit that there is no substantial difference between these two statutes; and that there is no substantial reason why one of these statutes should authorize the filing of a bond to release a lien for unpaid wages, and the other statute should not make similar provision for filing a bond.

In Lindsey v. Normet, 405 U.S. 56 (1971), one Oregon statute required an appellant in a civil case to file a bond to pay all damages, costs and disbursements which may be awarded against him on appeal; and in order to stay execution of a judgment for money, the bond was required to provide for payment of the judgment in event of its affirmance on appeal.

Another Oregon statute provided that in a summary proceeding to recover possession of real property, a defendant who wishes to appeal from a judgment awarding possession of the property to the landlord shall give a bond for twice the rental value of the premises, in addition to the bond required of all other appellants by the aforesaid general statute.

The Court held that the Oregon double bond statute unconstitutionally denied equal protection of the laws to appellants from judgments awarding possession of real property to landlords. The Court said (405 U.S. at 78, 79):

" \*\*\* if the lower court decision is affirmed, the entire double bond is forfeited; recovery is not

limited to costs incurred by the appellee, rent owed, or damage suffered. No other appellant is subject to automatic assessment of unproved damages. \*\*\*

\*\*\* The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious. \*\*\* The discrimination against the class of FED appellants is arbitrary and irrational, and the double-bond requirement of ORS §105.160 violates the Equal Protection Clause."

#### CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE REVERSED: PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE GRANTED: AND SECTION 220-b(2) OF THE NEW YORK LABOR LAW SHOULD BE ADJUDGED UNCONSTITUTIONAL FOR OMITTING TO PROVIDE FOR FILING A BOND TO SECURE PAYMENT OF ALLEGEDLY UNPAID WAGES AND TO RELEASE MONEY DUE AND WITHHELD FROM PAYMENT FOR PUBLIC CONTRACT WORK.

May 14, 1975.

Respectfully submitted,

MORRIS WEISSBERG  
Attorney for Appellant

**UNITED STATES COURT OF APPEALS  
for the Second Circuit**

**C.D.R. ENTERPRISES LTD.,**

**Plaintiff-Appellant,**

**- against -**

**HARRISON J. GOLDIN, etc.,**

**Defendant-Appellee**

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York

ss.:

I, James Steele, being duly sworn,  
depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
250 West 146th, Street, New York, New York  
That on the 15th day of May 1975 at Municipal Bldg, N.Y. N.Y.

deponent served the annexed *Briefs* upon

**W. Bernard Richiand**

the Attorney in this action by delivering <sup>2</sup> a true copy <sup>es</sup> thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the Attorney(s) herein.

Sworn to before me, this 15th  
day of May 19 75

*Robert T. Brin*

*James Steele*  
JAMES STEELE

ROBERT T. BRIN  
NOTARY PUBLIC, State of New York  
No. 31-0418950  
Qualified in New York County  
Commission Expires March 30, 1977